NO. 86-362

FILED
OCT 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

HOUSE OF WHEAT
and
WAYNE WHEAT,

Petitioners,

v.

CLIFF WRIGHT, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SECOND DISTRICT COURT OF APPEALS FOR MONTGOMERY COUNTY, STATE OF OHIO

RESPONDENTS' BRIEF IN OPPOSITION

David C. Greer
David R. Rudwall
BIESER, GREER & LANDIS,
of Counsel
400 Gem Plaza,
Third and Main Streets
Dayton, Ohio 45402
(513) 223-3277
Counsel for Respondents

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

QUESTION PRESENTED

SHOULD THIS COURT ASSUME JURISDICTION OVER A CASE BY GRANT OF A WRIT FOR CERTIORARI TO THE SUPREME COURT OF A SOVEREIGN STATE WHERE THE DECISION OF THE STATE COURT IS BASED UPON INDEPENDENT AND ADEQUATE STATE GROUNDS, AND WHERE THE PETITION FAILS TO ASSERT A STATUTORY BASIS FOR JURISDICTION AND FAILS TO SET UP A CLAIM UNDER THE CONSTITUTION, TREATIES OR STATUTES OF THE UNITED STATES?

The respondents submit that this question should be answered in the negative, and respectfully request that this Court deny the petition for writ of certiorari seeking review of the entry of record in the Supreme Court of Ohio.

LIST OF PARTIES AND RULE 28.1 STATEMENT OF AFFILIATED CORPORATIONS

The parties to the proceedings below and the parties before this Court are petitioners Wayne Wheat and House of Wheat, and respondents Clifford Wright, Jack Hurley, Richard Nordstrom, Miami Valley Broadcasting Corporation and its television station WHIO-TV.

Miami Valley Broadcasting Corporation is a wholly owned subsidiary of Cox Communications, Inc., which in turn is a wholly owned subsidiary of Cox Enterprises, Inc., a privately held corporation. The only affiliates of Miami Valley Broadcasting Corporation (i.e., other subsidiaries of Cox Enterprises, Inc., or its wholly owned subsidiaries) which are not wholly owned or controlled by Cox Enterprises, Inc., are: TeleRep, Incorporated; CyberTel Corporation; The Landsburg Company; Cox Cable New Orleans, Inc.; Cox Cable Spokane, Inc.; Cox Cable New York, Inc.; Cox Cable Cranston/Johnston, Inc.; Cox Cable Oklahoma City, Inc.; and Datext, Inc.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	I
SHOULD THIS COURT ASSUME JURISDICTION OVER A CASE BY GRANT OF A WRIT FOR CERTIORARI TO THE SUPREME COURT OF A SOVEREIGN STATE WHERE THE DECISION OF THE STATE COURT IS BASED UPON INDEPENDENT AND ADEQUATE STATE GROUNDS, AND WHERE THE PETITION FAILS TO ASSERT A STATUTORY BASIS FOR JURISDICTION AND FAILS TO SET UP A CLAIM UNDER THE CONSTITUTION, TREATIES OR STATUTES OF THE UNITED STATES?	
LIST OF PARTIES AND RULE 28.1 STATEMENT OF AFFILIATED CORPORATIONS	II
TABLE OF CONTENTS	III
TABLE OF AUTHORITIES	V
STATEMENT OF THE CASE	1
REASONS WHY THE PETITION SHOULD BE DENIED	4
I. PETITIONERS FAIL TO ASSERT A STATUTORY BASIS FOR JURISDICTION.	4
II. PETITIONERS FAIL TO DEMONSTRATE THAT A FEDERAL QUESTION WAS RAISED IN THE COURTS BELOW.	4
III. PETITIONERS FAIL TO SET UP A CLAIM UNDER THE CONSTITUTION, TREATIES OR STATUTES OF THE UNITED STATES. 28 U.S.C. § 1257.	5

Page

A. Petitioners' Due Process Claim Was Not Properly Raised Or Considered In State Courts As A Federal Question. 5

B. Petitioners Present No Substantial Question Of Federal Law. 6-7

IV. THE DECISIONS OF THE OHIO COURTS ARE BASED ON INDEPENDENT AND ADEQUATE STATE GROUNDS. 8

V. CONCLUSION 9

TABLE OF AUTHORITIES

Cases:	Page
Adams v. *Russell*, 229 U.S. 353 (1913)	8
Barnhardt v. *Linzell*, 104 Ohio App. 243, 148 N.E.2d 242 (1957)	5
Berea College v. *Kentucky*, 211 U.S. 45 (1908)	8
Bowe v. *Scott*, 233 U.S. 658 (1914)	5
Branzburg v. *Hayes*, 408 U.S. 665 (1972)	7
Columbus v. *New*, 1 Ohio St. 3d 221, 438 N.E.2d 1155 (1982)	5
Durley v. *Mayo*, 351 U.S. 277 (1956)	8
Erie R. Co. v. *Tompkins*, 304 U.S. 64 (1938)	6
Fidelity Trust Co. v. *Field*, 311 U.S. 169 (1940)	7
Fox Film Corp. v. *Muller*, 296 U.S. 207 (1935)	8
Fry Roofing Co. v. *Wood*, 344 U.S. 157, 160 (1952)	7
Grayson v. *Harris*, 267 U.S. 352 (1925)	7
Herb v. *Pitcairn*, 324 U.S. 117 (1945)	8
Klinger v. *Missouri*, 13 Wall. 257 (1871)	8
Lynch v. *New York ex rel. Pierson*, 293 U.S. 52 (1934)	8
Mazzella v. *Philadelphia Newspapers*, 479 F. Supp. 523 (E.D.N.Y. 1979)	6
Michigan v. *Long*, 463 U.S. 1032 (1983)	8
Paul v. *Davis*, 424 U.S. 693	6

Page

Portland Rail Co. v. *Railroad Commission*, 229 U.S. 397 (1913) 7

Ridgway v. *Ridgway*, 454 U.S. 46 (1981) 8

Steaks Unlimited, Inc. v. *Deaner*, 623 F.2d 264 (3d Cir. 1980) 6

William v. *Kaiser*, 325 U.S. 471 (1945) 8

Yeager v. *Local Union 20*, 6 Ohio St. 3d 369, 453 N.E.2d 666 (1983) 6

Zacchini v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) 8

Statutes:

28 U.S.C. § 1254(17) 4

28 U.S.C. § 1257 ..... 4, 5

STATEMENT OF THE CASE

This case arises from highly newsworthy events. On July 19, 1981, school children playing along the banks of the Great Miami River near Dayton, Ohio discovered several plastic autopsy sacks containing human viscera. The children placed the viscera in a plastic pail and carried them to the local police department. Police needed assistance in determining whether the viscera were human organs, as opposed to those of animals. The Montgomery County Coroner was contacted, and soon other law enforcement agencies and the County Prosecutor became involved in the investigation.

By the time respondents' television broadcasts were made, these public officials and others had been investigating the "viscera incident" for more than seven months. Due to a peculiar combination of three ideopathic diseases, forensic pathologists were able to trace the viscera to Delma Shine, who had passed away at a local hospital on July 13, 1981. Her internal organs had been embalmed and were therefore preserved when found by the children. The parties to this lawsuit have stipulated that the viscera found on the banks of the Great Miami River were to a medical certainty those of Delma Shine.

The hospital was quickly ruled out of suspicion since viscera are only embalmed at funeral homes, never at hospitals. The House of Wheat Funeral Home had embalmed and buried Delma Shine. A Wheat employee had picked up her viscera and corpse from the hospital.

After the viscera discovery, the Coroner's office was contacted by a former president of the Ohio Funeral Directors Association, who advised that in 1975 the

Association received a complaint from a former Wheat apprentice who had personally been instructed by Wayne Wheat to place body parts in a dumpster. The Coroner considered this to be evidence of prior similar acts and significant evidence of improper practices. In more than twenty years with the office, Prosecuting Attorney Lee C. Falke had never encountered a case involving dumped human viscera.

News of the "organ dumping incident" spread through the ranks of the funeral business for months before the story hit the press. The Greater Montgomery County Funeral Directors Association initiated conversations with the Prosecutor to do something about "highly unethical, abhorrent and disgusting" practices. Funeral directors called the media to inform that the Coroner was investigating the incident. By early March, 1982 the Coroner's office was being pressured by the public with requests for information.

Petitioners were not identified by name in press statements of the Prosecutor or Coroner, who were gathering evidence to seek felony indictments. At no time, however, did public authorities suspect that any entities other than petitioners were responsible for the viscera dumping.

On March 2, 1982 respondents Cliff Wright and Richard Nordstrum visited Wayne Wheat at the House of Wheat. Mr. Wheat immediately recognized respondents as television personalities and consented to be interviewed. The television broadcast that evening reported that the House of Wheat was under investigation. The broadcast included the filmed interview with Wheat, who denied that he or anyone in his organization had improperly disposed of human parts.

The Prosecutor was relieved when the media finally

identified the House of Wheat, since other funeral homes were being unfairly accused. The Prosecutor was reluctant to seek an indictment without more evidence. In April, 1982 the body of Mrs. Shine was exhumed. Her body cavities were empty of viscera, but were stuffed with packing paper and hardening compound.

Wayne Wheat and the House of Wheat were indicted. The Wheat case received considerable public attention for months. A unanimous jury found the House of Wheat guilty of gross abuse of a corpse. The criminal trial judge set aside the jury verdict. The court's ruling was not appealed.

On April 1, 1982 petitioners filed civil complaints against the respondent television station and three employees. The complaint alleged that broadcasts concerning the investigation of the Coroner and Prosecuting Attorney were defamatory, invaded Wayne Wheat's right to privacy, and were calculated to interfere with petitioners' business. The amended complaint sought 106 million dollars.

The trial court sustained motions for summary judgment as they related to claims of invasion of privacy, interference with business relations, and punitive damages. The case was tried with respect to claims of defamation commencing September 19, 1983 and submitted to the jury October 1, 1983. On the same day the jury returned a unanimous verdict against House of Wheat and a verdict against Wayne Wheat and in favor of respondents.

The Ohio Court of Appeals affirmed the judgment of the trial court on October 10, 1985. The Supreme Court of Ohio refused to certify the record for review on April 9, 1986, also dismissing the appeal for the reason that no substantial constitutional question exists in the record.

REASONS WHY THE PETITION SHOULD BE DENIED

I. PETITIONERS FAIL TO ASSERT A STATUTORY BASIS FOR JURISDICTION.

Petitioners argue "jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(17)" (Petition, p. 3). There is no subsection (17) to 28 U.S.C. § 1254. Section 1254 permits for certiorari from a federal court of appeal. This case, however, issues from the highest court of the State of Ohio, and has never been in the federal court system.

Under certain circumstances, review of an Ohio Supreme Court decision by certiorari may properly be invoked under 28 U.S.C. § 1257. The Court should not be required to guess the claimed statutory basis in order to determine jurisdiction. The Petition for Writ of Certiorari should be denied for lack of jurisdiction.

II. PETITIONERS FAIL TO DEMONSTRATE THAT A FEDERAL QUESTION WAS RAISED IN THE COURTS BELOW.

In seeking review of a state court judgment, petitioners' statement of the case must specify the stage in the proceedings where federal questions were first raised, the manner and method of raising them, the way they were passed upon by the state court, and quotations from specific portions of the record that will demonstrate that a federal question was timely and properly raised. Petitioners fail to demonstrate that any federal questions were raised in the courts of Ohio. Petitioners cannot show that any federal questions were raised to give this Court jurisdiction on writ of certiorari. Sup. Ct. R. 21(h).

III. PETITIONERS FAIL TO SET UP A CLAIM UNDER THE CONSTITUTION, TREATIES OR STATUTES OF THE UNITED STATES. 28 U.S.C. § 1257.

A. Petitioners' Due Process Claim Was Not Properly Raised Or Considered In State Courts As A Federal Question.

Petitioners argue that the ruling of the Ohio court upholding respondents' statutory privilege of nondisclosure of news sources is a denial of the "constitutional right of due process" (Petition, p. 17). An averment that due process rights have been violated, without reference to the Constitution of the United States and "asserting no express rights thereunder," is solely referable to the state's constitution and affords no basis whatever for invoking the jurisdiction of this Court. *Bowe* v. *Scott*, 233 U.S. 658, 664-65 (1914).

The Ohio Constitution guarantees the right to "due course of law." Ohio Const. art. I, sec. 16. Ohio courts have ruled that "due course of law" is parallel in meaning to the "due process of law" phrase of the Fourteenth Amendment to the United States Constitution. *Columbus* v. *New*, 1 Ohio St. 3d 221, 223, 438 N.E.2d 1155 (1982); *Bernhardt* v. *Linzell*, 104 Ohio App. 243, 148 N.E.2d 242 (1957). Therefore, petitioners' averment is referable only to the Ohio Constitution and not to the United States Constitution.

Petitioners aver no other constitutional violation as a basis for granting the writ. Because the petition alleges only a state constitutional violation, this Court has no basis for exercising its jurisdiction and the writ must be denied.

B. Petitioners Present No Substantial Question Of Federal Law.

Petitioners propose that a "false light" cause of action can be maintained without proof of "actual malice." This argument raises no federal question.

Whether a state should adopt the "false light" theory of recovery for tortious invasion of privacy is entirely a matter of substantive state law. The Ohio Supreme Court has expressly declined to adopt this theory of recovery. *Yeager* v. *Local Union 20*, 6 Ohio St. 3d 369, 453 N.E.2d 666 (1983). Since the *Erie* decision repudiated the view that federal courts are free to expound the "general" law, this Court has followed the rule that, except in matters governed by the federal Constitution or federal statutes, the substantive law to be applied in any case is the law of the state. *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938).

Petitioners also urge this Court to adjust Ohio judicial and statutory remedies for recovery from injury to reputation. This Court has held that the interest in one's reputation is "simply one of a number which the state may protect against injury by virtue of its tort law." *Paul* v. *Davis*, 424 U.S. 693, 712. The states have the right to create defamation actions, to not create defamation actions, or to remove such actions through testimonial privilege. *See, e.g., Steaks Unlimited, Inc.* v. *Deaner*, 623 F.2d 264 (3d Cir. 1980); *Mazzella* v. *Philadelphia Newspapers*, 479 F. Supp. 523, 528 (E.D.N.Y. 1979).

Petitioners question whether the respondent reporters should have been protected by Ohio's statutory and common law privileges which protect them from defamation actions when the allegedly defamatory statements concern newsworthy events or public proceedings.

Petitioners ask this Court to determine whether Ohio courts have properly applied state statutes with respect to facts of this case.

This Court does not undertake to determine the effect or construction of state statutes independent of treatment which the state itself has accorded to such statutes. *Fidelity Trust Co.* v. *Field*, 311 U.S. 169, 178 (1940). Further, this Court does not exert its jurisdiction merely to review a decision of a state court upon questions of fact. *Fry Roofing Co.* v. *Wood*, 344 U.S. 157, 160 (1952); *Grayson* v. *Harris*, 267 U.S. 352, 358 (1925); *Portland Rail Co.* v. *Railroad Commission*, 229 U.S. 397, 412 (1913).

Petitioners further argue an Ohio statute which shields reporters from forced divulgence of news sources denies due process rights. This Court has reasoned that: "It goes without saying, of course, that we are powerless to bar state courts from responding in their own way and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute." *Branzburg* v. *Hayes*, 408 U.S. 665, 706 (1972). Under prevailing legal doctrines, Ohio is free to confer an absolute privilege upon reporters not to disclose their news sources in defamation actions.

IV. THE DECISIONS OF THE OHIO COURTS ARE BASED ON INDEPENDENT AND ADEQUATE STATE GROUNDS.

Where a state court judgment is supported by a state law ground that is both adequate and independent of any federal questions raised in the proceedings, this Court has no jurisdiction to review the case. *See, e.g., Michigan* v. *Long*, 463 U.S. 1032 (1983); *Ridgway* v. *Ridgway*, 454 U.S. 46, 54 (1981); *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977); *Herb* v. *Pitcairn*, 324 U.S. 117, 125-26 (1945); *Fox Film Corp.* v. *Muller*, 296 U.S. 207, 210 (1935); *Berea College* v. *Kentucky*, 211 U.S. 45, 53 (1908); *Klinger* v. *Missouri*, 13 Wall. 257, 263 (1871). A petitioner must show that a federal question was presented to the state court and that a decision on the federal question was necessary to a determination of the cause. *See William* v. *Kaiser*, 325 U.S. 471, 477-78 (1945); *Lynch* v. *New York ex rel. Pierson*, 293 U.S. 52, 54-55 (1934). A petitioner must demonstrate that state grounds cannot account for the state court decision. *Durley* v. *Mayo*, 351 U.S. 277, 281 (1956). If neither of these are shown, it has been this Court's practice to decline jurisdiction. *Lynch* v. *New York ex rel. Pierson*, 293 U.S. at 54-55; *Adams* v. *Russell*, 229 U.S. 353, 358-59 (1913).

All issues which petitioners raise dealing with false light claims and the scope of respondents' privileges were decided either on the basis of Ohio common law or state judicial construction of Ohio statutes. The Ohio Supreme Court has determined that there is no justification for further review of this case (Addendum "A").

V. CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

David C. Greer
David F. Rudwall
BIESER, GREER & LANDIS,
of Counsel
400 Gem Plaza,
Third and Main Streets
Dayton, Ohio 45402
Telephone: (513) 223-3277
Counsel for Respondents